

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Criminal No. 4:93CR14WC
PAUL B. CLARK,	)	
	)	Violation:
Defendant.)	)	15 U.S.C. § 1

UNITED STATES' RESPONSE IN OPPOSITION TO  
DEFENDANT'S MOTION FOR A PROTECTIVE ORDER

Counsel for the defendant, Paul B. Clark, has moved, pursuant to Fed. R. Crim. P. 16(d), for an order to protect what he mistakenly refers to as his work product. In reality, the defendant simply objects to the cooperation provision of a Fed. R. Crim. P. 11 (e)(1)(C) plea agreement between the United States and Flav-O-Rich, Inc. ("FOR"). Not only does the defendant lack standing to object to the court-approved cooperation agreement between the United States and FOR, but he mischaracterizes the nature of that cooperation. Moreover, the disclosure of the defendant's request to a third party for documents and to interview witnesses is simply not covered by any stretch of the work product doctrine. Even if it were, the defendant would have waived the privilege by his communications with a non-privileged third party. The defendant's motion for a protective order is without standing or merit and should be denied.

On September 22, 1992, the United States and FOR entered into

a plea agreement which provided, among other things, that FOR would plead guilty to rigging dairy bids in six states, including Mississippi. A copy of the plea agreement is attached. In exchange for FOR's agreement to cooperate fully and candidly with the United States in the investigation and litigation of cases involving the dairy products industry, the United States agreed not to bring any additional charges against FOR for any act or offense committed prior to April 20, 1992, which was undertaken in furtherance of any conspiracy to submit rigged, fraudulent, or non-competitive bids for contracts to supply dairy products to any public institution in the United States. Plea agreement at ¶17.

Pursuant to the plea agreement, FOR is cooperating with the United States in its ongoing investigation of bid rigging and of other federal offenses in the dairy products industry in Mississippi. As part of its cooperation, counsel for FOR has agreed to inform the United States of requests made to FOR counsel by the defendant to interview witnesses or for documents. There is no requirement, as the defendant alleges in his motion, that "employees and agents of Flav-O-Rich divulge all communications [to the United States] with Defendant's counsel." Defendant's motion at 2. Not only has the defendant flatly mischaracterized the nature and scope of the cooperation agreement between FOR and the United States, but the defendant utterly lacks standing to object to the cooperation provided to

the United States by FOR, which is not a party to this case.

The defendant's claim that the disclosure of his request to FOR counsel to interview witnesses or to obtain documents is protected as work product is completely without merit. The work product doctrine is a qualified privilege for certain materials and the mental processes of an attorney in anticipation of litigation or for trial. United States v. Nobles, 422 U.S. 225, 238, 95 S.Ct. 2160, 2170 (1975). This is a qualified privilege which may be waived. In his Memorandum, the defendant cited one case, United States v. Nobles, id., which involved the disclosure of a report made by a party's investigator in connection with the investigator's testimony at trial. The defendant has cited Nobles for the proposition that the work product doctrine applies to criminal litigation as well as to civil litigation. The United States agrees. However, it is not surprising that the defendant is unable to support his contention that the disclosure to the United States of his request for documents or to interview witnesses to a third party, who has a court-approved agreement to cooperate with the United States in this and other litigation, is protected by the work product doctrine. Certainly, even if the defendant were able to find a basis upon which to characterize his request to interview witnesses and for documents as being protected by the work product privilege, he waived it in making such a request to a non-privileged third party, who shares no common interest in this litigation. Cf. Castle v. Sangamo

Weston, Inc., 744 F.2d 1464, 1466 (11th Cir. 1984)(work product privilege not waived when defendants gave material to federal agency, since plaintiffs' attorneys and counsel for the agency were preparing for a joint trial at the time).

Contrary to the defendant's claim, counsel for the United States has not attempted to circumvent the Court's Discovery Order in their request that FOR cooperate under the plea agreement. The United States has complied, and will continue to comply, with the Discovery Order. In fact, at this point, the United States has provided to the defendant access to all documents provided by FOR and other dairy companies to the grand jury and to the United States in the Mississippi investigation.

The defendant has mischaracterized the nature of the cooperation between the United States and FOR. It is absolutely proper for the United States to request FOR's cooperation under the terms of the plea agreement. The defendant may not like the fact that his former employer is cooperating with the United States, but he lacks standing to object to that cooperation. The defendant's communications with FOR counsel are not work product, nor is the disclosure of those communications to the United

States in any way a violation of the Court's Discovery Order.  
For these reasons, the defendant's motion should be denied.

Respectfully submitted,

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DOROTHY E. HANSBERRY

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